IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

'ROCK STONE,
Petitioner,
vs.
IEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, a Corporation,
Respondent.

No. 320

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Missouri,
and
BRIEF IN SUPPORT OF PETITION.

TYREE C. DERRICK,
KARL E. HOLDERLE, JR.,
418 Olive Street,
St. Louis 2, Missouri,
Attorneys for Petitioner.

. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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Cases Cited.

Statutes Cited.

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PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Missouri.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

SUMMARY AND SHORT STATEMENT OF MATTER INVOLVED.

Petitioner, Prock Stone's, suit for damages for personal injuries sustained while in the employ of respondent, based on the Federal Employers' Liability Act (45 U. S. C. A., Sections 51-59), was filed in the Circuit Court of the City of St. Louis, Missouri, on August 22, 1950 (R. 1). When

tried to a jury it resulted in a verdict and judgment for petitioner in the sum of $60,000 (April 5, 1951) (R. 117); thereafter, on July 2, 1951, petitioner, in order to avoid a new trial, remitted $10,000 from said verdict and judgment (R. 121).

On appeal by respondent from the judgment to the Supreme Court of Missouri, the judgment in petitioner's favor was reversed because in the court's opinion the evidence was not sufficient to make a jury case (R. 125).

At the time of petitioner's injuries on or about May 2, 1949, he was employed by respondent as a track laborer at Argos, Indiana (R. 7). The employment of the plaintiff and the fact that both plaintiff and defendant were engaged in interstate commerce was admitted by the pleadings (R. 4, 5). While so employed, Stone was working on respondent's track at a place called the "Y" track formed by a track connecting the two main lines of respondent (R. 9-11).

At the time of his injury, petitioner was assigned to the task of removing old and worn track ties (R. 11). The straw boss, Richard Stoughton, was in charge (R. 8). Petitioner and a fellow-employee, Lloyd Fish, were unable to remove a particular tie in the usual, ordinary and customary manner, because a spike driven through the tie into the ground prevented its removal by pulling on the tie with tie tongs (R. 12). Petitioner told Richard Stoughton (straw boss) that the tie was hard to come out and Stoughton picked up a bar, walked over to the other end of the tie and told petitioner he was not pulling hard enough. Then Stoughton put the bar under the end of the tie and "got a prizen hold over the rail and gave a lift." Petitioner gave a pull and the tie still wouldn't come out (R. 12, 51, 52, 60, 61). Dick Stoughton testified that in order to pull out a tie with a spike through it, it would

require the efforts of four men (R. 97). Despite the fact that defendant's straw boss knew it was awful hard, and two men could not pull it, and it required four men, he ordered plaintiff to pull harder (R. 12, 51, 52, 61). Although the testimony respecting the number of men actually assisting in extricating the tie at the time is not clear (Stoughton apparently was not prying on the tie at the precise time when plaintiff gave the fatal jerk) (R. 51, 60, 61), there was sufficient evidence to justify the jury's finding that only two men were actually working at extricating the tie.

The evidence showed that three methods of removing a tie with a spike driven through it were available and known to the defendant:

(a) Extricating the tie by the combined strength of four men, two men pulling, one prying, and somebody else hammering on the end with a spike maul (R. 53, 54, 97). This method was not recommended by the foreman, Slagle, who testified if a tie pulled hard the men should push it back over and dig a deeper trench (R. 106). He recommended a different method.

(b) Roll the tie over and dig a deeper trench beside the tie was the method recommended by Eugene Slagle, the foreman, and the method he had instructed the men to use (R. 106). Lloyd Fish described the use of this method (R. 58).

(c) Freeing the rail from the ties a half a rail length either way from the tie to be removed and jacking the rail up, freeing the tie sufficiently so that the stubborn tie can be slid out by two men with safety (R. 56, 57, 58, 63, 64). Dick Stoughton, the straw boss, admitted this method would be safer (R. 96).

At the time of plaintiff's injury the straw boss was directing the removal of the tie under method (a) with

the use of two men (R. 12, 51, 52, 60, 61). When the tie was jerked it would come up against the rail and was not free (to come out) (R. 53). Stoughton told Stone to pull harder, Stone protested that he was pulling as hard as he could (R. 61). Thereafter, Stoughton directed Stone to pull harder and taunted him for not trying and said, "If he couldn't pull to get to hell off of it and he would get somebody that would" (R. 52); "If you can't pull any harder I will get somebody that will" (R. 61). Thereupon, on the order of defendant's straw boss, Dick Stoughton, the petitioner, after protesting, gave a hard pull, a big jerk (R. 12, 52, 61). When petitioner jerked on the tie he hurt his back and said, "I am not pulling on no damned tie that hard any more" (R. 12, 44).

The testimony also showed that the straw boss had encountered several ties with spikes in them on this particular "Y" track (R. 93, 95) in less than two days of work (R. 96), and it took three to four men to get them out because the spikes stuck down into the ground and would hold the ties (R. 96). You could not raise the tie high enough because the rails weren't high enough from the ties (R. 97). The boss, Eugene Slagle, said they knew something was holding the tie because it pulled so hard and with a spike in it, the tie raises up and hits the rail when you jerk on it (R. 106). This is what happened when Stone and Fish pulled on the tie in question.

The tie in question was finally removed by four men, Charles Hopkins, Dick Stoughton, Bert Bailey and Lloyd Fish (R. 53, 54). It was removed by Fish and Hopkins pulling on the tongs, Stoughton prying with a crow bar over the rail and Bert Bailey using a maul, hammering as the tie was pulled (R. 53, 54).

Respondent's evidence was to the effect that Richard Stoughton didn't remember any complaint by Prock Stone

that he hurt his back pulling a tie (R. 94); that it would be impractical to jack the track too high because dirt will get under the ties; also, it would require the trains to stop, but it would be a lot safer that way (R. 96). Eugene Slagle, section foreman, testified that on May 2 the crew was not working at the "Y" (R. 100) and that he had never heard Stone complain of having injured his back until about June 1 (R. 103); that if a spike is through a tie it would not be necessary to take additional men to remove it if they would pull the tie back over and dig the trench deeper (R. 106). If you jack the rail too high the ballast will run under the other ties and you get a hump in the track (R. 107).

Instructions.

The court gave an instruction on petitioner's behalf requesting the jury to find that if respondent either (a) negligently ordered petitioner to exert more force than was ordinarily and customarily necessary to remove a tie, (b) negligently failed to furnish petitioner additional help in removing the tie, or (c) negligently failed to use a safer method which was available, it (the jury) could find for petitioner (R. 110-113). Defendant moved for a directed verdict which the trial court overruled (R. 110).

Verdict and Judgment.

Thereafter, on April 5, 1951, the jury returned a verdict in plaintiff's favor for $60,000.00 (R. 117) and judgment was entered on said verdict (R. 117). Defendant filed a motion for a new trial on April 9, 1951 (R. 118), which was overruled by the court on June 25, 1951, on the condition that plaintiff remit $10,000 from the verdict (R. 120). Plaintiff remitted $10,000 from the verdict, the court set aside the previous judgment, entered a new judgment for $50,000 and overruled the defendant's motion for a new

trial (R. 121). Defendant appealed to the Supreme Court of Missouri by Notice of Appeal filed July 3, 1951 (R. 121).

On April 14, 1952, Division No. 1 of the Supreme Court of Missouri reversed the judgment of the trial court on the ground that plaintiff did not make a submissible case under the Federal Employers' Liability Act (R. 125). Plaintiff thereafter filed a Motion for Rehearing or to Transfer the case to the Court en Banc (R. 138), which was overruled on June 13, 1952, and the court modified its opinion on its own motion (R. 143-144). The Supreme Court of Missouri did on June 18, 1952, on motion of petitioner, order its mandate stayed in said cause (R. 144).

The duly certified record of the case, including all of the proceedings in the Circuit Court of the City of St. Louis, Missouri, and in Division No. 1 of the Supreme Court of Missouri, is filed herewith under separate cover.

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked under Section 1257, Title 28, United States Code, which provides for review by the United States Supreme Court, by Writ of Certiorari, of final judgments of the highest court of a state where any right, privilege or immunity is specially set up or claimed under the statutes of the United States.

The judgment of the Supreme Court of Missouri, Division No. 1, sought to be reviewed was originally entered on April 14, 1951 (R. 125). A motion for rehearing and to transfer said case from Division No. 1 to the Missouri Supreme Court, en Banc, was filed on April 26, 1951, within the time provided by the rules of the Supreme Court of Missouri (R. 138), and said motion of petitioner was denied on June 13, 1952, which is the date on which the judgment of said Division No. 1 of the Supreme Court of Missouri became final (R. 143, 144).

Division No. 1 of the Supreme Court of Missouri, upon its refusal to grant a rehearing or to transfer the case to the Court en Banc, was the highest court of the state in which a decision could be had in said case. Petitioner has exhausted every opportunity for appellate review by the Supreme Court of Missouri.

In said case petitioner specially set up and claimed a right under a statute of the United States, namely, the Federal Employers' Liability Act, 45 U. S. C. A., Sections 51-59 (R. 1, 125). The opinion of the Missouri Supreme Court reversing the verdict and judgment of the trial court in favor of petitioner, for the reason that petitioner's evidence did not make a submissible case under that statute, denies him the rights afforded under that statute. The court, by its decision, has, to the detriment of petitioner, resorted to an erroneous interpretation and application of a federal statute.

Cases thought to sustain jurisdiction are:

Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916;
Brown v. Western Ry. of Ala., 338 U. S. 294, 70 S. Ct. 105, 94 L. Ed. 100;
Seago v. New York Central R. Co., 315 U. S. 781, 62 S. Ct. 806, 86 L. Ed. 1188;
Jenkins v. Kurn, 313 U. S. 256, 61 S. Ct. 934, 85 L. Ed. 1316;
New York Central R. Co. v. Marcone, 281 U. S. 345;
Chicago R. v. Devine, 239 U. S. 52, 36 S. Ct. 27, 60 L. Ed. 140.

The questions presented herein are of general public interest and importance because they not only affect this plaintiff, but the rights of all other injured railroad employees throughout the forty-eight states to a jury trial.

under the Federal Employers' Liability Act. If the opinion is allowed to stand, there will be conflict between this and other state and federal courts as to the jury's right to determine the question of negligence and under what circumstances an employer is obligated to use a safer method of doing work. It will result in different rules being applied in different jurisdictions to the same question. The opinion limits, contorts and sterilizes the Congressional intent and the interpretation placed upon the statute by opinions of this Court.

Petitioner filed and presented this petition, together with his brief in support thereof, and the record, to this Court on September 9, 1952, which is within ninety days from June 13, 1952, the date of the judgment sought to be reviewed.

QUESTIONS PRESENTED.

The questions presented by the petitioner herein for a Writ of Certiorari are:

I.

Whether, in an action brought by Prock Stone against the New York, Chicago & St. Louis Railroad Company, under the Federal Employers' Liability Act, the evidence adduced at the trial, under the applicable decisions of this Court, was sufficient to make a submissible case for the jury?

II.

Can a State Court of last resort, under the applicable decisions of this Court, in reviewing the evidence submitted to and passed on by a jury, in an action brought under the Federal Employers' Liability Act, substitute its findings, deductions and conclusions from the evidence for

that reached by a jury in its verdict when the evidence justifies a verdict either way on the issues?

III.

Whether the evidence in an action under the Federal Employers' Liability Act of and relating to an order to pull harder, coupled with taunts and threats, given to the plaintiff in the course of his employment while engaged in interstate commerce, obeyed by the plaintiff over his protests that he and his fellow employee were pulling as hard as they could, and resulting in injury to him, is sufficient, under the applicable decisions of this Court, to warrant the submission to a jury of this charge of negligence in whole or in part, against the defendant?

IV.

Whether, in an action brought by the plaintiff under the Federal Employers' Liability Act for injuries sustained in the course of his employment while engaged in interstate commerce, the evidence that plaintiff and his fellow employee were ordered to pull a tie from under the rail, when the defendant knew, or should have known, they could not do so, and that four men were necessary to perform the task, is sufficient evidence, under the applicable decisions of this Court, to warrant the submission to a jury of this charge of negligence in whole or in part, of defendant's failure to furnish the plaintiff with sufficient help to remove the tie in question?

V.

Does the opinion of the Missouri Supreme Court in the case of Prock Stone v. New York, Chicago & St. Louis R. Co., 249 S. W. (2) 442, and that of the Texas Court of Civil Appeals in the case of Gulf, Colorado & Santa Fe Ry. v. Waterhouse, 223 S. W. (2) 654, present conflicting rules

on the same question under the Federal Employers' Liability Act of whether an order to an employee to do certain work, over his protest, is a negligent order and hence violates the rule of this Court in the case of Urie v. Thompson, 337 U. S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282, and other applicable decisions of this Court, which require uniform determinations in all jurisdictions of what constitutes a submissible question of negligence under the Federal Employers' Liability Act?

Isn't the opinion of the Missouri Supreme Court in the instant case also in conflict with this Court's opinion in Blair v. B. & O. R., 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490?

VI.

Does the opinion of the Missouri Supreme Court in the case of Prock Stone v. New York, Chicago & St. Louis R. Co., 249 S. W. (2) 442, and that of the Court of Appeals (First Circuit) in the case of Boston & Maine R. v. Meech, 156 F. (2) 109, present conflicting rules on the same question under the Federal Employers' Liability Act as to whether or not an employer is required to use a safer method of doing work, which method is known to the defendant and available to it, at the time in question, and hence violates the rule of this Court in the case of Urie v. Thompson, 337 U. S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282, and other applicable decisions of this Court, which require uniform determination in all jurisdictions of what constitutes a submissible question of negligence under the Federal Employers' Liability Act?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

This action is brought under the Federal Employers' Liability Act, 45 U. S. C. A., Secs. 51-59, for injuries sustained by Prock Stone while he was in the employ of the New York, Chicago & St. Louis Railroad (R. 1, 125). It was admitted by the pleadings that both the plaintiff and the defendant were engaged in interstate commerce at the time of plaintiff's injuries (R. 4). The evidence presented to the jury showed that Prock Stone was working as a section hand on a "Y" track of the defendant at Argos, Indiana; that he was engaged in the task of removing old ties and replacing them with new ones; that plaintiff and his fellow employee, Lloyd Fish, encountered a tie with a spike driven through it extending into the ground making it unusually difficult to remove; that together they could not remove the tie by pulling on it with the tie tongs furnished them and called on their straw boss, Dick Stoughton, for additional help (R. 12, 51, 52, 60, 61).

The evidence further showed that safer methods were available to remove a tie with a spike driven through it into the ground. They are:

(a) Remove the tie by the use of four men pulling on it; two men using tie tongs, one man prying with a pinch bar and one man hammering with a maul (R. 53, 54, 97);

(b) Roll the tie over on its side and dig a V-ditch deep enough to roll the tie into and then slide it under the rail (R. 58, 106);

(c) Remove the spikes holding the rail to the ties about half a rail's length forward and back and jack the rail high

enough to clear the tie to be removed so it can be pulled out (R. 56-58, 63-64). This was testified to as being a safer method (R. 96).

There is evidence from which the jury could conclude that only two men were in fact engaged in extracting the tie at the time plaintiff was injured (R. 51, 52, 61). The straw boss, Stoughton, who testified that it required four men to pull out such a tie, nevertheless, directed Stone and Fish to pull harder, over Stone's protest that the tie was hard to come out and that he was pulling as hard as he could (R. 12, 51, 52, 60, 61). At the direction of Stoughton to pull harder, that he wasn't pulling, to pull harder or to get to hell off and he would get someone else who would, Stone gave a hard pull and injured himself (R. 12, 51, 52, 60, 61).

The evidence, with the inferences fairly and reasonably arising therefrom, tended to show that the defendant caused plaintiff's injuries by: (a) negligently ordering him to exert more force than was ordinarily and customarily necessary; (b) failing to furnish the plaintiff sufficient men to assist him in performing the task assigned to him, and (c) failing to use a safer method which was available and known to the defendant.

Nevertheless, Division No. 1 of the Supreme Court of Missouri, in its opinion in said cause (Prock Stone v. New York, Chicago & St. Louis R., 349 S. W. [2] 442), ruled that plaintiff failed to make a submissible case for the jury and ruled that the submission of the case to the jury was not based on substantial evidence.

Said ruling is erroneous and not in accord with the applicable decisions of this Honorable Court holding that on controverted or disputed evidence, the evidence is to be viewed in the light most favorable to plaintiff giving the

plaintiff the benefit of every reasonable inference and conclusion that can be drawn therefrom; that the credibility of the witnesses and the weight to be given their testimony are for the jury; and that if, on the issue of liability, reasonable and fair-minded men may honestly draw different inferences from the evidence, such issue is not one of law for the Court, but one of fact for the jury.

II.

The Supreme Court of Missouri reversed the verdict of the jury and erroneously substituted its own inferences, findings and conclusions of fact from the evidence. This is in direct conflict with the applicable decisions of this Court holding that where there is a conflict in the evidence, the issue is one of fact for the jury and the Court cannot substitute its findings for those of the jury.

Some of the Court's conclusions, and the evidence which supports the jury's verdict are as follows:

(a)

The Court found "* * * We have concluded that plaintiff did not make a submissible case under the Act * * *" (R. 125).

The evidence showing that plaintiff made a submissible case is stated in Point I above and in the Summary and Short Statement and we incorporate that evidence by reference here.

(b)

The Court further stated in its opinion: "In other words, there was evidence neither of actual knowledge nor 'foreseeability' that plaintiff might be injured as a result of his compliance with the order" (R. 131).

Yet the record evidence from which the jury found otherwise is as follows:

Defendant's witness, Stoughton, testified that he had had nine years' experience in railroading (R. 90).

> "Q. * * * You say there were two or three occasions where you had ties with spikes in them? A. Yes, sir.
>
> Q. Was that on this north Y? A. Yes, sir (R. 95).
>
> Q. And two men without some help from somebody on the end prying and somebody else can't pull one of those ties out with the spike in them. Can they? A. No, it is awful hard" (R. 97).

Eugene Slagle testified as follows:

> "Q. If they pull it out it takes more than two men. It takes three or four men, doesn't it? A. It wouldn't be necessary if they would push the tie back over and dig the ditch deeper. It would drop down lower and then they could pull it out easy.
>
> Q. If they knew the spike was there they would do that, wouldn't they? A. They knew something was holding it or it wouldn't pull so hard (R. 106).
>
> Q. With a spike in it when you are jerking it out and you raise it hits the top of the rail as it comes up, doesn't it? A. That's right" (R. 106).

The plaintiff testified as follows:

> "Q. Did you ever see a tie that you have occasion to pull a tie out with a spike in it before? A. No, sir, I never did, I don't think I ever pulled one with a spike down through it like that" (R. 15).

From this evidence couldn't the jury reasonably infer that since the straw boss was experienced in track work, and that it usually took four men to pull a tie of the kind

in evidence when the method of pulling, rather than dropping a tie into a ditch dug for that purpose then pulling it out, was used, that injury might result from improper directions for two men to do a task that required four men?

(c)

The Court further said, in making its own conclusion, in order to justify its reversal of the jury verdict, that "The usual and customary methods were followed" (R. 132), and the Court further said:

> "The undisputed evidence was that, at the time he gave the order, Stoughton and his crew were following the regular and usual method of getting out a tie hard to remove, and one that probably had a spike in it" (R. 135).

The jury found that the usual and customary method was not followed. The usual and customary method of removing a tie with a spike through it was to either have four men pull it out (R. 97) or, preferably, to roll the tie over and dig the trench deeper so as to slide it out. There is no evidence that it was customary for two men to pull such a tie.

The evidence was as follows (Eugene Slagle):

> "A. * * * If they pull hard I have always told them to push it back over and dig their trench deeper.
>
> Q. If they pull it out it takes more than two men—it takes three or four men, doesn't it? A. It wouldn't be necessary if they would push the tie back over and dig the trench deeper, which would drop down lower and then they could pull it out easy.
>
> Q. If they knew the spike was there they would do that, wouldn't they? A. They knew something was holding it or it wouldn't pull so hard" (R. 106).

Lloyd Fish, plaintiff's witness:

"Q. How do you generally handle that, a tie that won't come out that way because it has a spike in it? A. You most generally dig a ditch alongside of it and deeper, kind of a V-shape, and let that spike not hit anything.

Q. You would turn the tie over, is that it? A. We could turn it sidewise if the ditch is deep enough" (R. 58).

(d)

The Court further substituted its finding of fact for that of the jury in holding that:

"* * * In any event, plaintiff admitted that, on the next effort of the three (in which he sustained his injuries), he exerted no more effort than he ordinarily did in pulling a tie without a spike in it" (R. 134).

"* * * Plaintiff admits he did not comply with the order by pulling any harder than he usually did. By his own admission fixing the amount of energy he actually used, the order did not cause plaintiff to overexert himself and, hence, did not cause his injuries" (R. 137).

"* * * But even if, as plaintiff argues, defendant ordered him to exert more force than he was exerting, plaintiff did not, in fact, exert more force and, hence, the order was not the cause of his injury" (R. 137).

"* * * There was no evidence that plaintiff exerted more strength because of lack of sufficient help" (R. 137).

Here the Court completely ignored the evidence and repudiated the jury's verdict. The evidence showed that over Stone's protest he was taunted and ordered to pull harder. In response to the command he pulled harder, he jerked on the tie. The testimony is (Buster Hopkins):

"* * * He told Mr. Stone to pull harder. Mr. Stone told him he was pulling as hard as he could. Mr. Stoughton said, 'If you can't pull any harder, I will get somebody that will.' * * *, and it went on, and Mr. Stone got down, him and Mr. Fish, and they pulled pretty hard on the tie and they jerked it * * *" (R. 61).

Mr. Fish testified:

"* * * So Prock and I give it a big jerk, that is when he quit and said he hurt his back" (R. 51).

Mr. Stone testified:

"* * * We give a pull and it wouldn't come, and he said, you are not pulling, if you can't pull that tie, I will get somebody on both tongs that can.

Q. Then what did you do? A. Well, we both got back down and give a hard pull * * *

Q. What did you do when you hurt your back? A. I just raised up and turned the tongs loose, I guess I was pretty mad, I said I was never going to pull on a tie like that that hard again and I walked up the track" (R. 12).

and

"A. You mean me? I said, 'I am not pulling on no damned tie that hard any more.' I think that's what I said" (R. 44).

(e)

In direct conflict with the evidence, the Court substituted its own finding for that of the jury as follows:

"* * * The issue was not submissible in the instant case because there was no evidence whatever from which it could be inferred that the number furnished

was not sufficient to enable the workman or workmen to do the work with reasonable safety" (R. 134, 135).

The evidence indicates that at the time plaintiff was injured only two men were working in extricating the tie (R. 52, 61) even though defendant's straw boss said the work required four men (R. 97), and the section foreman, Slagle, said the proper method was to roll the tie over and dig the trench deeper.

The testimony is (Dick Stoughton):

"Q. And two men without some help from somebody on the end prying and somebody else can't pull one of those ties out with the spike in them, can they? A. No, it is awful hard" (R. 97).

Stoughton's superior, the section foreman, Slagle, testified:

"* * * If they pull hard I have always told them to push it back over and dig their trench deeper.

Q. If they pull it out it takes more than two men, it takes three or four men to do it? A. It wouldn't be necessary if they would push the tie back over and dig the trench deeper, it would drop down lower and then they could pull it out easy" (R. 106).

Petitioner in his motion for a rehearing (R. 138) called the Missouri Supreme Court's attention to the fact that it was substituting its findings for those of the jury and that it ignored testimony and inferences which could be drawn from other testimony favorable to the plaintiff. The motion for rehearing was overruled by the court (R. 143, 144). This action on the part of the court was erroneous and not in accord with the applicable decisions of this Court holding that where there is a conflict in the evidence or any evidence from which a reasonable inference may be drawn, then it becomes a question for the jury and not the court.

Therefore, since the Missouri Supreme Court reversed the judgment entered on the verdict of the jury granting damages to the plaintiff under the Federal Employers' Liability Act, he was denied a right under a Federal Statute which calls for the issuance of this Court's Writ of Certiorari to bring before you the entire record for review.

III.

The opinion of the Missouri Supreme Court in the case of Stone v. New York, Chicago & St. Louis R., 249 S. W. (2) 442, brought under the provisions of the Federal Employers' Liability Act, holds that the order to Stone to exert more force, or "get the hell off," over his protest that he was pulling as hard as he could, was not a negligent order, and the evidence relating thereto did not make a submissible case. The opinion of the Texas Court of Civil Appeals in Gulf, Colorado & Santa Fe Ry., 223 S. W. (2) 654, decided under the same statute, holds that an order to Waterhouse to continue working, over his protest that the weather was too hot, was a negligent order, and would make a submissible case.

These two views are diametrically opposite, and since both were decided under the Federal Employers' Liability Act, two separate rules on the question of what constitutes a negligent order under the statute are held out as being the law.

Under the decision of this Court in Urie v. Thompson, 337 U. S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282, and other applicable decisions of this Court there must be uniformity in determining what constitutes negligence for the statute's purpose. The rules with respect to what makes a submissible case shall not vary according to each jurisdictions' conception of what evidence is sufficient to make a case for the jury.

The holding of the Missouri Supreme Court moreover is in direct conflict with the opinion of this Court in Blair v. B. & O. R. Co., 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490, which held that a submissible jury case was made in connection with an order to Blair to do the work or they "would get somebody else that would." The Missouri Supreme Court's opinion contravenes the holding of this Court in the Blair case that the nature of the undertaking which plaintiff was commanded to perform, the method of the undertaking and the number of men assigned to assist him, his experience and the experience of his foreman all raised questions appropriate for the jury to find as a matter of fact whether the injury was the result, in whole or in part, of the defendant's failure to comply with its duties.

Since the opinion of the Missouri Court sets up a different standard of negligence from that set up by this Court and by the Texas Court, this Court should issue its Writ of Certiorari to review the opinion of the Missouri Supreme Court and the evidence adduced at the trial and determine once and for all the amount of evidence necessary to make a submissible jury case, and which of the two rules shall prevail.

Unless this Court grants certiorari for the purpose of maintaining uniformity of the rules among the State and Federal Courts, numerous like erroneous rulings will be made by other courts in following first one rule and then another of the two mentioned above.

IV.

The opinion of the Missouri Supreme Court in the case of Stone v. New York, Chicago & St. Louis R. Co., 249 S. W. (2) 442, brought under the provisions of the Federal Employers' Liability Act, holds that the employer is not

required to use a safer method of doing work, which safer method is both known and available to the defendant. The Court of Appeals (First Circuit) in the case of Boston & Maine R. v. Meech, 156 F. (2) 109, requires further precautions to be taken to protect employees, when available, and safer methods of doing the work to be used.

The views presented in these two cases are diametrically opposite and since both were decided under the Federal Employers' Liability Act, two separate rules now prevail on the same point. Under the decision of this Court in Urie v. Thompson, 337 U. S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282, and other applicable decisions of this Court there must be uniformity in determining what constitutes negligence for the Statute's purpose. The rulings with respect thereto shall not vary according to each jurisdiction.

Since the opinion of the Missouri Court sets up a different standard for employing a safer method than that set up by the United States Court of Appeals (First Circuit), this Court should issue its Writ of Certiorari to review the opinion of the Missouri Supreme Court and determine once and for all the question with respect to the employment of a safer method and which of the two rules shall prevail.

Unless this Court grants certiorari for the purpose of maintaining uniformity of the rules among the State and Federal Courts, numerous like erroneous rulings will be made by other Courts in following first one rule and then another of the two mentioned above.

V.

The Supreme Court of Missouri, Division No. 1, by its opinion in the case of Prock Stone v. New York, Chicago & St. Louis R. Co., 249 S. W. (2) 442, has erroneously interpreted a Federal Statute of general importance, which is

constantly involved in voluminous litigation in both Federal and State Courts, and in a way not in accord with, but directly contrary to the applicable decisions of this Court.

It is a matter of prime public importance that the right to a jury trial guaranteed to injured railroad employees and their dependents by the Federal Employers' Liability Act be recognized and enforced by every court in the land fairly, impartially, and uniformly. Not only are the rights of instant plaintiff affected hereby, but the rights of other injured railroad employees throughout the entire nation.

The question is one of great general public interest and importance, and unless the disparity between the rules set up by the Supreme Court of Missouri and the other courts mentioned herein, is resolved into uniformity by this Court, confusion will result in the state courts throughout the nation futilely attempting to reconcile the different irreconcilable rules set forth on the points mentioned herein. To that end, and to the end, too, that right and justice may prevail in this case, and that the rights of all future litigants in similar circumstances may be protected and that the Congressional intent expressed by the Federal Employers' Liability Act be not sterilized by judicial erosion, this Honorable Court's Writ of Certiorari should issue herein.

PRAYER.

Wherefore, petitioner prays this Court to issue its Writ of Certiorari, to the Supreme Court of Missouri, to review the opinion in the case of Prock Stone v. New York, Chicago & St. Louis R. Co., No. 42,803, as decided by Division No. 1 of that court on April 14, 1952, and upon said review as provided by law, to reverse the same and reinstate the judgment of the trial court in order that there be harmony

of decisions and conformity to the Statute, and so that the right to trial by jury of litigants throughout the nation under the Federal Employers' Liability Act may be preserved.

.....

TYREE C. DERRICK,

.....

KARL E. HOLDERLE, JR.,
418 Olive Street,
St. Louis 2, Missouri,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION.

THE OPINION BELOW.

The opinion of the Supreme Court of Missouri which sought to be reviewed appears at pages 125-138 of the record. It has not yet been officially published but is reported in 249 S. W. (2) 442.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 1257, Title 28, United States Code. The jurisdictional statement in the petition, pages 6-8, is in more detailed form and is incorporated herein by reference.

SUMMARY STATEMENT OF THE CASE.

A summary statement of the case is set out in the petition, annexed hereto, on pages 1-6, and is incorporated herein by reference.

SPECIFICATIONS OF ERROR.

The Supreme Court of Missouri, in its opinion, erred:

1. In holding that the evidence was insufficient to make a submissible case for the jury;

2. In holding that the order defendant gave plaintiff to jerk harder was not negligent, in conflict with applicable decisions of this Court and other state courts, and the injuries plaintiff sustained were not a result of said order;

3. In holding that under the evidence and the law defendant was not charged with foreseeability that injury might result from the negligent order;

4. In holding that the defendant was following the customary method of pulling ties with spikes driven through them;

5. In holding that there was no causal connection between the negligent order and the injury;

6. In holding that there was no evidence to justify submitting the question to the jury on the issue of the failure of the defendant to furnish plaintiff sufficient help in conflict with applicable decisions of this Court and other Federal and State courts;

7. In holding that defendant did not have to use a safer method than that being used, when it knew of a safer method which was available, in conflict with applicable decisions of other federal courts;

8. In substituting its findings of fact for those of the jury in conflict with other applicable decisions of this Court.

The problems presented are of general public importance and are not limited in effect to the petitioner herein. The effect is nation wide on thousands of railroad employees under the application of the Federal Employers' Liability Act.

SUMMARY OF ARGUMENT.

1. There is sufficient evidence in the record, together with reasonable inferences to be drawn therefrom, to justify the submission of the case to the jury, and the Court has no right to substitute its findings for those of the jury on factual issues.

2. There is ample evidence to submit to the jury the question of the negligent order. The straw boss knew that it ordinarily took four men to pull a tie such as the one mentioned in the evidence and on which two men were working. He had been told that Stone and Fish couldn't pull it. He was directing the men to follow a method, not usual or customary in pulling a tie that was hard to come out, yet he taunted and threatened petitioner in order to get obedience to his order to pull harder, which resulted in injury to petitioner.

3. There is ample evidence from which a jury can find that the defendant should have foreseen that injury might result to petitioner from an order to exert more force than usual and customary, when the usual method of removing ties was not followed. A safer method was known to and available to the defendant, but instead of using the safer method it was attempting to perform a task with two men that it knew ordinarily required four men to perform. The method being used was not the one recommended by the foreman.

4. It was a question for the jury to determine from the evidence whether or not the defendant furnished sufficient help to petitioner to remove the tie in question. The evidence is that defendant had been advised that the two men working (Stone and Fish) couldn't pull the tie; that it ordinarily took four men to do the work; that the foreman had previously directed a method of digging a trench beside the tie, sliding the tie into it and then pulling it

out, and that it ultimately took four men to remove the tie, two pulling, one prying and one hammering on it with a spike maul.

5. The opinion of the Supreme Court of Missouri sets up a different rule with respect to the evidence necessary to make a submissible case on the question of a negligent order from that in the case of Blair v. B. & O. R., 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490, and Gulf, Colorado & Santa Fe Ry. v. Waterhouse (Texas Civil Appeals), 223 S. W. (2) 654. Furthermore, the opinion of the Missouri Supreme Court sets up a different rule with respect to the duty of an employer to use a safer method of doing work than that set up by the court in the case of Boston & Maine R. v. Meech, 156 F. (2) 109.

In order to maintain harmony among the several jurisdictions, this Court should issue its Writ of Certiorari to review the opinion and evidence in order to resolve the conflict.

ARGUMENT.

This is a petition for a Writ of Certiorari to the Supreme Court of Missouri. As set out in the petition, the suit arises out of injuries sustained by the petitioner while employed by a railroad carrier. Both petitioner and defendant below were engaged in interstate commerce at the time and petitioner's action, therefore, was brought under the Federal Employers' Liability Act, 45 U. S. C. A., Sections 51-59. The defendant is the New York, Chicago & St. Louis Railroad Company.

The statute under which the suit was brought, in pertinent part, is as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several states . . ., shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . ., for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier . . ." (45 U. S. C. A. 51).

Plaintiff alleged that his injuries were the result of the negligence of the defendant, and more particularly as the result of a negligent order, coupled with the failure to furnish sufficient help and failure to use a safer method of doing the work which was known and available to the defendant below.

On the trial plaintiff adduced evidence to sustain the above three specifications of negligence and the trial court submitted the questions to the jury under appropriate instructions on each of the foregoing specifications.

A verdict resulted in plaintiff's favor and a judgment was entered thereon. Defendant appealed and the Supreme Court of Missouri reversed the judgment below on

the ground that, as a matter of law, there was not sufficient evidence to warrant its submission.

After unavailing motions by the plaintiff in the Missouri Supreme Court, the court of last resort, the judgment became final.

Within the time allowed by law plaintiff is here seeking a review of the State Court's decision for the causes set out in the "Reasons Relied on for the Allowance of the Writ," and more particularly because the court has arrogated to itself functions that this Court has repeatedly held belong to a jury. The evidence was conflicting, and as shown by the trial judge's submission of the case to the jury and the jury's verdict thereon, opinions of fair minded men differ as to the inferences and conclusions to be drawn from the evidence. This Court has held in Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916, that such conflicts are to be resolved by a jury and not determined as a matter of law by a court.

Under the decisions of this Court, what constitutes negligence for the purpose of the Federal Employers' Liability Act is a federal question and the interpretation of what is or is not negligence shall not vary according to the different conceptions of the various state courts. One uniform interpretation shall govern and that interpretation shall be as determined by this Court, and for that reason cases arising under the Federal Employers' Liability Act are subject to the independent review of this Court. Urie v. Thompson, 337 U. S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282, l. c. 1294.

The employer's degree of liability is to be determined by a jury using as a guide what it (the jury) believes a reasonable and prudent person would have done under the same circumstances and you so held in the recent case of Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497, l. c. 504.

Since this action was brought under the Federal Employers' Liability Act, the special rights there granted to injured railroad workers are not to be taken away by judicial erosion. In appraising a case brought under the Federal Employers' Liability Act, the court must do so with greater care than in other cases so as not to narrow the rights by judicial legislation and encroach upon the functions of the jury. The law in this respect was very aptly stated by Mr. Justice Douglas in his opinion in Bailey v. C. V. Ry., 319 U. S. 350, l. c. 354, 63 S. Ct. 1062, 87 L. Ed. 1444:

> "The right to trial by jury is a 'basic and fundamental feature in our system of federal jurisprudence.' Jacob v. New York City, 315 U. S. 752. It is part and parcel of the remedy afforded railroad workers under the Federal Employers' Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. That method of determining the liability of the carriers and placing on them the cost of these industrial accidents may be crude, archaic, and expensive as compared with the more modern system of Workmen's Compensation. But however inefficient and backward it may be, it is the system which Congress has provided. To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of their relief which Congress has afforded them."

To the same effect and that courts are not to search the record for conflicting evidence to find against the plaintiff and that juries are to determine conflicting factual issues are the following cases:

> Tiller v. Atlantic Coast Line R., 318 U. S. 54, 68, 63 S. Ct. 444, 451, 87 L. Ed. 610, 143 A. L. R. 967;

Bailey v. Vermont Ry., 319 U. S. 350, 354, 63 S. Ct. 1062, 1064, 87 L. Ed. 1444;

Tennant v. Peoria & P. U. Ry., 321 U. S. 29, 32-35, 64 S. Ct. 409, 411, 412, 88 L. Ed. 520;

Lavender v. Kurn, 327 U. S. 645, 653, 66 S. Ct. 740, 744, 90 L. Ed. 916;

Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413, 417, 418, 93 L. Ed. 1282;

Blair v. B. & O., 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490;

Louisville & N. R. v. Botts, 173 F. (2) 164, 167.

While the Supreme Court of Missouri has given lip service to the principles of law set forth in these cases, it has totally failed to follow the rules determined by this court, and set out in its opinion, 249 S. W. (2) 442, and contrariwise has construed the evidence in the light most favorable to the defendant. The court, in its opinion, has commented on the evidence, drawn inferences and conclusions therefrom that are unwarranted and not supported by the evidence; it has ignored evidence favorable to the plaintiff, has placed a narrow construction on that evidence favorable to him; and has searched the record with a fine tooth comb for conflicting evidence in order to take the case from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences.

It stated the rules of this Court which it was required by Urie v. Thompson, supra, to follow, yet in application ignored them and substituted its conclusions and findings for those of the jury, who saw the witnesses and heard their testimony at the time of trial.

I.

The Petitioner Made a Submissible Case.

A.

THE NEGLIGENT ORDER.

1. The Evidence Was Sufficient.

The trial court concluded that the factual issues presented a question for the jury and submitted the case to a jury which returned a verdict in plaintiff's favor. The Supreme Court of Missouri, Division No. 1, decided that the judge and jury were wrong and said the following:

> "* * * But there was absolutely no evidence from which the jury could have inferred that the tie could not have been safely removed by plaintiff, Fish and Stoughton, with plaintiff pulling harder or exerting more force. In other words, there was evidence neither of actual knowledge nor 'foreseeability' that plaintiff might be injured as a result of his compliance with the order" (R. 131).

We respectfully submit that the record evidence is diametrically to the contrary. With all the reasonable and favorable inferences drawn therefrom to which plaintiff is entitled, the evidence is sufficient to support the finding of the jury. And it must be emphasized that in this case the jury found in favor of the plaintiff on the evidence adduced. This verdict cannot be set aside unless there is a complete absence of probative facts to support this conclusion.

The record is clear that the straw boss, Dick Stoughton, had more than nine (9) years experience in track work of this kind and he admitted that he had encountered ties

with spikes driven through them on the very "Y" track where plaintiff was injured (R. 93, 95). Contrast this with the fact that plaintiff had no previous experience with a tie with a spike driven through it (R. 15) and that before Stone was hurt he told Stoughton that with him and Fish pulling, the tie wouldn't come loose (R. 12). Even the foreman, Eugene Slagle, Stoughton's superior realized that Stoughton knew or should have known that a spike was holding the tie because he testified, "They knew something was holding it or it wouldn't pull so hard" (R. 106). He went further and stated that when a tie is hard to pull because a spike is through it, he always told them to push it over and dig the trench deeper (R. 106).

Why would the foreman direct his men to roll the tie over and dig the trench deeper rather than to pull the tie out by brute force if he did not believe an employee might be injured? And when Stoughton disregarded the instructions of his superior, and an employee was injured thereby, he is chargeable with the knowledge of his superior.

Furthermore, Stoughton himself testified that it took four men to remove a tie with a spike in it (R. 97), and yet he was directing Stone and Fish to do this work alone (R. 12, 52, 61). This alone put him on notice that a man might be injured. One must not lose sight of the fact that when Stoughton insisted that Stone pull harder, Stone told him he was pulling as hard as he could (R. 61). Nevertheless, because of the threat and the possibility of losing his job if he refused to pull harder, Stone thereafter gave the tie a pull, a big jerk (R. 52, 61) and pulled too hard (R. 34).

This evidence supports the finding of the jury that Stoughton should have realized that Stone might be hurt if he pulled harder. Stoughton knew that a spike was preventing the tie from being removed. From his ex-

perience he knew that such a tie could not be removed by the brute force of two men, but that four were necessary. His superior, Slagle, had directed the men not to pull such a tie but to roll it over and dig the trench deeper. When Stoughton taunted Stone with the statement that he wasn't pulling hard enough, Stone replied that he was pulling as hard as he could. It was **after** this that Stone, at Stoughton's direction, gave the jerk that caused his injury.

When the tie wouldn't move with two men pulling on it, and still wouldn't budge when Stoughton pried on it, there is certainly evidence from which a jury could infer that Stoughton should have anticipated that Stone might well over-exert himself and sustain an injury when he commanded him thereafter to pull—pull harder. A master can't be oblivious to all the surrounding circumstances and conditions in ordering his men to over-exert themselves and then be absolved from responsibility because he couldn't anticipate the consequences of his acts. This is especially true here where the means of knowledge was at hand.

In the following cases brought under the statute here in question, evidence relating to orders such as was given here, was held to make a jury question:

Blair v. B. & O. R., 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490;

Williams v. Terminal R. (Mo. App.), 20 S. W. (2) 584, 596;

C. R. I. & P. Ry. v. Cline, 91 Colo. 255, 14 P. (2) 495;

P. A. W. R. Co. v. Tomas (9th Cir.), 36 F. (2) 210;

Schirra v. Delaware L. & W. R., 103 F. Supp. 812.

The Missouri Supreme Court would distinguish these cases on the ground that there was no hazard that Stoughton should be required to have foreseen when he gave the

order. In making such a finding (R. 134) the Court arrogated to itself the function of the jury. It is for the jury to determine whether, under this evidence, and the reasonable inferences to be drawn therefrom, Stoughton should have foreseen the hazard to the plaintiff.

We next direct your attention to the order to Stone to pull harder and examine the law with respect to it.

2. The Opinion Conflicts With That of Other Jurisdictions.

The holding of the Missouri Supreme Court in the case at bar is in conflict with the case of Gulf, Colorado & Santa Fe Ry. v. Waterhouse, decided under the Federal Employers' Liability Act by the Texas Court of Civil Appeals, 223 S. W. (2) 654, 660, and Blair v. B. & O. R., 323 U. S. 600, 65 Sup. Ct. 545, 89 L. Ed. 490. The courts there construed negligent orders and the evidence supporting them.

In the Waterhouse case the court held the plaintiff made a submissible case, and that holding applies with equal force to the case at bar. In this case the plaintiff suffered a heat stroke after being ordered back to work by his foreman. He had complained to his foreman of feeling too hot, and in spite of his protest, the foreman sent him back to work. In holding that Waterhouse was entitled to recover the Texas Court said that the first order given to Waterhouse to do the work was not negligent, because the foreman had not set the pace of the work, but that after Waterhouse registered his protest about continuing the work, the foreman's subsequent order to work was a negligent one.

From this it is apparent that the reason the first direction to Waterhouse was not a negligent one was because he was free to do the work as he pleased and was not required to do the work in any particular manner.

This applies with equal weight here. When Stone protested that he was pulling as hard as he could, Stoughton was put on notice that Stone was then exerting as much force as he could. Any further exertion would amount to over-exertion and Stoughton should anticipate that Stone might be injured thereby. And when Stoughton, thereafter, directed Stone to pull harder he did so in the face of Stone's protest that he was pulling as hard as he could.

Just look at the evidence.

When Stone and Fish attempted to remove the tie and encountered difficulty, they informed the straw boss, Dick Stoughton. He immediately accused Stone of not trying and said he wasn't pulling hard enough (R. 12, 52, 61). Stone then told him he was pulling as hard as he could (R. 61). Stone asked that the rail be jacked a little higher (R. 50) and Stoughton gave it a little more jack (R. 51). Then Stoughton took a bar and pried on the end of the tie (R. 12, 51, 61). Stoughton again directed Stone to pull harder. Stoughton claimed they weren't pulling hard enough and Stoughton and Stone got into a heated exchange of words (R. 52).

The testimony of the witnesses concerning this order is as follows:

Prock Stone:

"A. Well, we were—I practically maybe took hold of the tongs and pulled it myself, I don't know for sure, anyway I know Fish had to get on the tie with me, Larry Fish, and we both couldn't pull it and Stoughton was around some where, we asked him, we told him about the tie, it was hard to come out or something, so he picks up a bar, walks over to the other end, maybe, he says to me, you are not

trying. You ain't pulling hard enough. So he puts the tie, fixed a bar under the end of the tie, he got a prizen hold over the rail and give us a lift. We give a pull and it wouldn't come, and he said, you are not pulling, if you can't pull that tie, I will get somebody on both tongs that can. That is the words he said to me.

Q. Then what did you do? A. Well, we both got back down and give a hard pull with him a prying and I hurt my back (R. 12).

Q. Why did you pull it out as you did? A. I was told to" (R. 15).

Lloyd Fish testified:

"Q. What was the occasion for doubling up? A. It wouldn't move.

Q. I see. Now go ahead and tell what happened. A. Well, so we doubled up and the tie wouldn't come. We would jerk it, it might move an inch I would say at a time, and Mr. Stone asked for more jack (R. 50).

Q. All right, then what happened? A. We still couldn't pull it (R. 51).

Q. Tell us what happened, Mr. Fish. A. Well, Dick claimed we wasn't pulling hard enough, and, oh, they kind of got into it back and forth . . . Dick said, he wasn't pulling hard enough, if he couldn't pull to get to hell off of it and he would get somebody that would.

Q. Then what did Mr. Stone do, and what did you do? A. We give it another pull. That is when Stone quit and said he hurt his back" (R. 52).

Charles Hopkins:

"A. . . . Mr. Fish and Mr. Prock (Stone) were pullling and Dick come up and started helping. **He told Mr. Stone to pull harder. Mr. Stone told him he was pulling as hard as he could.** Mr. Stoughton said, 'If

you can't pull any harder I will get somebody that will' and they got down and Mr. Stoughton got a bar and started hitting it, trying to push it out, to push the tie out, and it went on, and Mr. Stone got down, him and Mr. Fish and they pulled pretty hard on the tie and they jerked it. Mr. Stone stepped back off the tongs and raised up about half way and said, 'I hurt my back,' and started walking up the track . . . " (R. 61).

These facts certainly come within the Waterhouse case. Stoughton had nine years of track experience and knew the problems and consequences connected with removing a tie with a spike driven through it into the ground. He saw the difficulty Stone and Fish were having and accused Stone of not trying. He knew that it took at least four men to pull that tie out. Stone then protested that he was pulling as hard as he could. Thereafter, Stoughton pried on the tie and when it wouldn't come loose he again taunted Stone by saying he wasn't pulling hard enough, if he couldn't pull to get the hell off and he would get somebody that would. It was after Stone's protest and Stoughton's subsequent direction to pull harder that Stone was injured.

After Stoughton saw the difficulty the men were having and after Stone protested that he was pulling as hard as he could, didn't Stoughton then set the pace of the work by taunting Stone to pull harder or he would replace him with someone that would?

Wasn't it negligent for him to direct two men to pull that tie out when he knew it required four men?

We believe in the light of the Waterhouse case there can be no question but that Stone made a submissible case and that the defendant is liable for giving the negligent order.

What was said by the Court in the Waterhouse case applies with equal weight to the case at bar. It is as follows, l. c. 661:

> "* * * The jury were authorized to find that the foreman's order to plaintiff to return to work after plaintiff complained to him, was a legal cause of plaintiff's injury, as they necessarily did under issue 9 . . . . Plaintiff's obedience to the order was not an intervening act of an independent agency as a matter of law, **but the immediate, intended and expected consequence of the foreman's order. It cannot be said that plaintiff knew that he would be injured if he went back to work.** Since the order was a legal cause of the servant's injuries, this was enough to make the defendant liable under the Federal Employers' Liability Act * * *" (Emphasis ours.)

In attempting to distinguish the Stone and Waterhouse cases, the Missouri Supreme Court said:

> "Furthermore, the Waterhouse case is distinguishable in that plaintiff, unlike Waterhouse made no protest against working when he was not in physical condition * * *" (R. 134).

When Stoughton directed Stone to pull harder and Stone replied that "he was pulling as hard as he could" (R. 61), didn't that signify that his physical ability had been reached and anything beyond would be overtaxing his physical condition and ability? The jury was certainly entitled to draw this inference.

We submit that the Missouri Supreme Court's attempted distinction of this case is one without a difference.

The Missouri Court's opinion is in conflict with the rule announced in the case of Blair v. B. & O. R., 323 U. S. 600, 65 S. Ct. 549, 89 L. Ed. 490, wherein this Court held that a submissible case was made under the Federal Employers'

Liability Act by a railroad employee injured while unloading steel tubes from a railroad car under direction of a foreman to do the work or they "would get somebody else that would." In that opinion it was stated, l. c. 547:

> "* * * we cannot say as a matter of law that the railroad complied with its duties in a reasonably careful manner under the circumstances, nor that the conduct which the jury might have found to be negligent did not contribute to petitioner's injury, in whole or in part. Consequently we think the jury, and not the court, should finally determine these issues."

The opinion of the Missouri Supreme Court in the case at bar is in conflict with that of the Texas Court of Civil Appeals and with opinions of this Court and provides a different rule with respect to the sufficiency of evidence necessary to make a jury case under the Federal Employers' Liability Act.

The decisions of the United States Supreme Court have consistently held that a uniform rule must be followed in **all states** in determining the amount of evidence necessary to make a case under the Federal Employers' Liability Act and that it is not subject to the control of the several states. The following cases support this rule of law:

Brown v. Western R. of Ala., 338 U. S. 294, 295, 70 S. Ct. 105, 94 L. Ed. 100;

Brady v. Southern Ry., 320 U. S. 476, 64 S. Ct. 232, 88 L. Ed. 239.

The order of the straw boss, Dick Stoughton, to "pull harder or get the hell off of it and he would get somebody that would," viewed in the light of the above cases, leaves no doubt but that a submissible case was made under the negligent order theory and that the opinion of the Missouri Supreme Court with respect to the evidence necessary to make a submissible case under the Federal Employers' Liability Act is in conflict with the rule set forth by courts

of other states and by this Court. The evidence shows without a doubt that Stone's injuries were caused, at least in part, by defendant's negligence.

B.

THE FAILURE TO FURNISH SUFFICIENT HELP.

Division No. 1 of the Missouri Supreme Court found that:

> "The issue (furnishing sufficient help) was not submissible in the instant case because there is no evidence whatever from which it could be inferred that the number furnished was not sufficient to enable the workman or workmen to do the work with reasonable safety" (R. 134, 135).

Let's look at the record to determine whether or not the evidence adduced supports the jury's verdict on this question. At the time plaintiff was injured he and Lloyd Fish were pulling on the tie. There is also evidence that Dick Stoughton had assisted by attempting to pry on the tie with a pinch bar. But the evidence is not entirely clear that Stoughton was so prying at the time that Stone and Fish gave the big jerk which resulted in Stone's injury (R. 51, 52, 61).

The record is crystal clear that four men were required to remove a tie with a spike in it. The strongest evidence on this point is the statement of defendant's own witness, Dick Stoughton, who testified that:

> "Q. And two men with the help from somebody on the end prying and somebody else can't pull one of those ties out with a spike in it? A. **No**, it is awful hard" (R. 97).

The evidence is further undisputed that when the tie was removed it took four men to remove it, Fish and Hop-

kins pulling and Stoughton prying and Bailey driving the tie with a spike maul (R. 53, 54, 61).

Moreover, the foreman on the job, Stoughton's superior, Eugene Slagle, testified that he had directed the men not to pull on a tie that was hard to get out, but that they should roll the tie over and dig the trench deeper (R. 106, 107).

In reviewing this evidence, it is essential to remember that the plaintiff is entitled to the most favorable construction that can be placed on the evidence and all reasonable inferences to be drawn therefrom. The Supreme Court of Missouri in its opinion attempted to color the evidence by its comment that three men could do the work, but the most favorable evidence to the plaintiff is that four men were required to do it and this was so testified to by defendant's own witness, Dick Stoughton. The evidence is that only Stone and Fish were pulling on the tie at the time Stone was hurt. Although there is evidence that Stoughton did attempt to assist by prying on the tie there is a conflict in the evidence as to whether or not he was doing so at the precise time he directed Stone and Fish to pull harder. Under these circumstances the jury had a right to infer from the evidence that only two men were attempting to extricate the tie at the time when Stone was injured.

The record is likewise clear that it required at least four men to remove a tie with a spike through it by pulling on it (R. 97). Stone's protest to Stoughton that he and Fish were not able to pull the tie out, squared with Stoughton's own admission that it took four men to remove such a tie, creates a submissible jury question.

The final outcome of the jerk made by Stone, which resulted in his injury, is sufficient evidence for the jury to

conclude that the men furnished could not perform the task under the circumstances then and there existing and that more help should have been furnished. It is for a jury, not the court, to draw all reasonable deductions and inferences from the evidence, whether the evidence be direct or circumstantial. Under the evidence adduced here, it is clear that the defendant did not furnish sufficient help. The following cases support petitioner's contention:

Blair v. B. & O. R. Co., 323 U. S. 600, 65 S. Ct. 545, 547, 89 L. Ed. 490;
Robak v. Pennsylvania R. Co., 178 F. (2) 485;
Chesapeake & Ohio v. Winder, 23 F. (2) 794.

The court in its opinion further found that there was no evidence that:

> "* * * in the pull plaintiff made after the order and in which he wrenched his back, he exerted more strength than ordinarily necessary . . . Plaintiff admits that he did not comply with the order by pulling any harder than he usually did. By his own admission fixing the amount of energy he actually used, the order did not cause plaintiff to over-exert himself and, hence, did not cause his injuries" (R. 137).

This is an unwarranted conclusion of the court based upon an extremely narrow and erroneous construction of the evidence and a construction most detrimental to the plaintiff. The finding is not supported by the evidence.

This finding is based on the following evidence:

> "Q. Directing your attention to your statement a moment ago that you jerked on the tie, Mr. Stoughton told you to jerk harder on the tie or he would get someone who would; I will ask you whether or not the jerk that you and Fish made on the tie was ordinarily enough to pull a tie out? A. Yes, sir, it was" (R. 15).

The court has certainly misinterpreted the meaning of this reply and has placed the most narrow construction possible on it. Stone merely stated that the force he exerted in response to the order was ordinarily sufficient to pull a tie out that did not have a spike driven through it into the ground. Nowhere did he say he did not exert more force than usual in pulling this tie with a spike through it, and the record is entirely void of any admission on the part of Stone that he didn't pull harder. The court has failed to point out such an admission and its finding is a conclusion not based on evidence which invades the province of the jury. It is an interpolation made to support its act of reversal of the judgment.

The court has ignored the testimony that **after** Stoughton told Stone he "was not pulling hard enough" (R. 12, 52) he commanded him to pull **harder** or he would get someone that would (R. 12, 52, 61). Thereafter Stone gave a **big jerk** (R. 52, 61) in response to this command. Stone himself testified that he would never pull that hard on a tie again (R. 12, 44).

Since the plaintiff is entitled to the most favorable construction to be placed on the evidence, isn't it reasonable for the jury to infer that if Staughton complained that Stone wasn't pulling hard enough and then commanded him to "pull harder" that Stone would obey that command and exert still more physical force to remove the tie? The very fact that Stone and Fish **jerked** the tie has a definite meaning, and Stone's statement that he would never pull that **hard** again certainly negatives any idea that he didn't exert an additional amount of strength.

Furthermore, the evidence elicited by defendant on cross-examination emphasizes the fact that Stone **pulled too hard** (R. 34). If a man says he is pulling as hard as he can and after being commanded to pull harder, he does so, and then complains of having pulled too hard, could the

jury reach any other conclusion but that he, Stone, exerted more force than he had previously done in response to that command?

Just what does the word "jerk" signify to the average person? What does this word denote to a jury of twelve men chosen to find the facts? Doesn't that word itself signify some additional, hard, unusual exertion of strength? Under any view there is sufficient conflict to make a submissible jury question.

In view of all this evidence and the rule that the plaintiff is entitled to the most favorable construction of and the inferences from that evidence, it is clear that the evidence here is sufficient to support the issue that the defendant failed to furnish sufficient help to the plaintiff. In this case the jury has determined by its verdict that the help furnished plaintiff was insufficient and that the plaintiff over-exerted himself in compliance with the order to "pull harder." Since the jury is the one to resolve conflicts and since there is a conflict in the evidence, an appellate court has no right to substitute its findings for those of the constitutional tribunal appointed by Congress to decide these factual issues.

II.

The Holding by the Missouri Supreme Court That a Safer Method Known and Available Need Not Be Employed by the Defendant Is in Conflict With the Rule in the Case of Boston & Maine R. v. Meech, 156 F. (2) 109 (First Circuit).

The court has said that:

> "The undisputed evidence was that, at the time he gave the order, Stoughton and his crew were following the regular and usual method of getting out a tie hard to remove . . . ." (R. 135).

This finding is based entirely on the court's own conclusion and is contrary to the evidence.

What were the customary and usual methods available to remove a tie with a spike through it?

A) To pull the tie with brute force with the use of four men pulling. This method was testified to and admitted by defendant's witness, Stoughton (R. 97). But was not recommended by the foreman, Slagle (R. 106, 107).

B) Roll the tie over and dig the trench deeper. This is the method that the foreman, Eugene Slagle, directed his men to use whenever they encountered a tie that was hard to remove, and Dick Stoughton disobeyed this direction of his foreman in commanding Stone to pull harder.

Eugene Slagle testified:

"Q. . . . How many men does it take to pull them out ordinarily? A. Well, they don't know they are in there until they get the tie out. **If they pull hard I have always told them to push it back over and dig their trench deeper.**

Q. If they pull it out it takes more than two men, it takes three or four men, does it? A. It wouldn't be necessary if they would push the tie back over and dig the trench deeper, it would drop down lower and then they could pull it out easy (R. 106).

A. . . . it would be very foolish to go to all that work (removing spikes and jacking up rail) just to get the rail up **when you could dig the trench deeper and take the tie out that way**". (R. 107).

Stone himself testified to this method (R. 14, 15).

Lloyd Fish testified:

"Q. How do you generally handle that, a tie that won't come out that way because it has a spike in it?

A. You most generally dig a ditch alongside of it and deeper, kind of a V shape, and let that spike not hit anything.

Q. You would turn the tie over, is that it? A. We could turn it sideways if the ditch is deep enough" (R. 58).

Hopkins also testified to this method (R. 63).

The evidence is clear that the customary method to remove a tie with a spike driven through it was to use **four** men to pull it out, and not two as was being done at the time Stone was injured. In fact, Slagle, the foreman, did not recommend pulling the tie with four men, but directed his men to follow the customary method of digging the ditch alongside the tie deeper and then rolling the tie into that ditch. Apparently Slagle thought the method of pulling the tie out by brute strength was unsafe, otherwise he would not have recommended against that method, and the jury was entitled to make that inference from the evidence. In any event, it is clear that the usual and customary method was not being employed at the time petitioner was injured.

However, a still safer method than those mentioned above was known to the defendant. This safer method consisted of pulling the spikes out of the ties for half a rail length on either side of the tie sought to be removed, thus freeing the rail from the ties, and then jacking the rails up high enough to free the tie to be removed so that the tie and spike would be free to come out. The testimony of the method was as follows:

Lloyd Fish:

"Q. Now, could you have jacked the rails up high enough to free that tie? A. The only way we could have done that would have been to drop it and pull the

spikes out of the other ties next to it, oh I would say a half a rail length, and just raise the rail alone.

Q. By doing it that way, would that have freed the tie from the rails? A. It would have (R. 53).

Q. By doing that, I will ask you to state whether or not that tie could have been pulled out by one man? A. I would say it would have took two men to pull it out with the rails off of it to get it out from under there" (R. 58).

Buster Hopkins:

"Q. How could you have raised the rails then high enough to free it? A. Well, you could lift the track back down, pull the spikes out about half a rail length forward, and then half back, and raise it up far enough to leave the tie come up and pull it out.

Q. Would that take a little more time? A. Yes, it would.

Q. But the tie would then be free, would it? A. Yes, the tie would be free.

Q. Then how many men could pull it? A. Two" (R. 63, 64).

Dick Stoughton admitted this method would be safer. He testified:

"Q. Couldn't you loosen the spikes a few ties down and lift the rail free of the ties?

* * * * * * * *

A. It could be done.

Q. And it would be safer where you are trying to pull a tie out that is hard to pull?

* * * * * * * *

Q. Well, I know it would (take longer) but it would be a lot safer, wouldn't it? A. Yes, sir" (R. 96).

We thus say that there is sufficient evidence on which the jury could infer that the method being used at the

time Stone was hurt was not a reasonably safe one and there is further evidence of a safer method known to the defendant at the time and available to it, which could have been used.

The Supreme Court of Missouri ruled as a matter of law that this safer method need not be followed because that would set up a higher standard than reasonable care (R. 136). We submit that this ruling by the Missouri Court is in conflict with the holding in the case of Boston & Maine R. Co. v. Meech, 156 F. (2) 109, certiorari denied 329 U. S. 763, and this conflict should be reconciled by this Court.

The Missouri Court tried to constrict the limits of that decision and distinguish it from this case on the ground that it applied only to a safe place to work, or the operation of a locomotive. We fail to see this narrow limitation and submit that the principle of law announced by the First Circuit was not so narrowly stated.

In the Meech case the court specifically pointed out that the accident could possibly have been prevented by placing another man on the locomotive to look out for employees along the track or could have sounded a whistle. In referring to the negligent operation of the engine and what precautions **might** have been taken to avoid the accident, that court said, l. c. 111:

> "* * * if is clear that although **some** precautions were taken for decedent's safety, **further** precautions were possible. * * *." (Emphasis ours.)

The holding in the Meech case applies with equal weight to the case at bar. Additional precautions were possible—a safer method of removing the tie could have been employed. In fact, the section foreman had directed the use of a different—a safer—method from that used.

Plaintiff is entitled to all the favorable inferences from the evidence, and the evidence is sufficient for the jury to determine that the method being used was both inadequate and unsafe.

There was ample evidence of a safer method to be used. Instead of pulling the tie by force the spikes could have been removed from the ties on each side of the one being removed, and then the rail could have been jacked high enough to free this tie (R. 53, 57, 58, 63, 64). Stoughton admitted that this would be safer (R. 256).

Rather than construe the evidence and all favorable inferences therefrom in plaintiff's favor, the Missouri Court has substituted its findings for those of the jury and concluded that the method suggested would slow up defendant's operations and set up higher standards of conduct and require a duty of absolute safety (R. 136). The Court has narrowly construed the evidence in spite of the emphasis in recent decisions of this Court that the scope of jury inferences in cases under the Federal Employers' Liability Act must be liberally and not narrowly or stultifyingly reviewed. Terminal R. Assn. of St. Louis v. Howell, 165 F. (2) 135.

Under the law as announced in Urie v. Thompson, supra, the Court is required to place the most favorable construction on the evidence in plaintiff's favor, and not to argue the matter; it is for the jury to determine whether the method used was unsafe, and if so, whether the method suggested was safer, available and reasonable to use.

The Missouri Court's opinion is more of an argument of the facts to justify its reversal of the jury's finding than a statement of what the evidence showed. It is clearly a substitution of its findings for those of the jury.

CONCLUSION.

Petitioner respectfully submits that the record evidence clearly justifies a submission to the jury of the question of the negligent order, the safer method and the sufficiency of the help furnished. Furthermore, the opinion of the Missouri Court is in conflict with and sets up rules in direct opposition to the holdings of the United States Supreme Court and other State and Federal courts construing rights afforded to railroad workers under the Federal Employers' Liability Act.

Wherefore, your petitioner prays this Court to issue its Writ of Certiorari to the Supreme Court of Missouri so that the record can be reviewed and the judgment of that Court reversed and the judgment of the trial court reinstated so that harmony may be obtained and the right to trial by jury preserved to litigants under the Federal Employers' Liability Act.

Respectfully submitted,

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TYREE C. DERRICK,

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KARL E. HOLDERLE, JR.,
418 Olive Street,
St. Louis 2, Missouri,
Attorneys for Petitioner.